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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 83

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,

Petitioner,

vs.

W. E. CARROLL, CLARENCE H. CALHOUN, MRS. HATTIE J. PICKARD, MRS. EMMA B. MOORE AND SAM PICKARD, TRUSTEE FOR SAM PICKARD, JR.,

Respondents

REPLY BRIEF FOR PETITIONER

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With the permission of the Court we desire to reply to certain contentions advanced by the respondents in their brief on the merits. Apparently respondents rely primarily for an affirmance of the judgment below upon the following propositions:

1. Decision of the Federal question raised by petitioner was not necessary to the decision of the State court because (a) the contract called for the payment of a sum *equal* to 15 per cent of the net billings of the station rather than for the payment of 15 per cent of

the net billings themselves, and (b) since petitioner concedes that respondents are not altogether remediless and the Supreme Court of Georgia has ruled that petitioner did not in its answer make out a case for any affirmative equitable relief, the Court of Appeals of Georgia was authorized to award damages as for breach of contract in the sum of $144,968.63.

2. Respondents have not collaterally attacked the rulings of the Commission and no ruling was sought or had from the State court regarding any question over which the Commission had jurisdiction.

3. There was no duty or obligation upon respondents to intervene before the Commission as the private rights of the respondents under the contract could not be adjudicated by the Commission, and it would be a denial of due process to hold that the Commission's rulings relative to the contract are binding upon respondents.

We believe that we can demonstrate the basic unsoundness of all these contentions.

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A decision upon the Federal questions in this case, as to the binding effect of a ruling of the Commission, the effect of this ruling on any action to enforce the contract, and the respect to which the Commission's ruling is entitled under Article VI, when that ruling is pleaded in a subsequent proceeding in a State court, was an indispensable preliminary to a final decision upon the contract itself. And these that Federal questions were squarely raised by petitioner in its original answer. In its answer petitioner pleaded as a defense the various proceedings before the Commission and the decisions of the Commission with respect thereto (R. 18-84). At the trial evidence was introduced, without objection, to support this defense (R. 89-96). The trial court ruled adversely to that defense (R. 108-112). Petitioner ex-

cepted and assigned error upon this ruling in its appeal (R. 112-122). We submit that before the court below could properly make final disposition of the question of whether there was an unexcused breach of contract it had to pass upon the Federal questions necessarily presented by petitioner's defense.

(a) It is inconceivable to us that the decision in this case should be controlled by the words "a sum *equal* to 15 per cent of the net billings". It is true that this language appears in Paragraph 4 of the contract (R. 12). However, in the same paragraph of the contract there also appears this language (R. 13):

> "Within ten (10) days after the expiration of each month from and after the aforesaid effective date of this contract, the party of the first part shall determine the net billings for said month and *shall pay fifteen (15%) per cent thereof* to the hereinafter named agent of the second parties and *said monthly payments of fifteen (15%) per cent of the net billings of said Station* shall exist and continue for a full period of eighty and three-fourths (80¾) months and until January 6th, 1950." (Emphasis added)

Counsel for respondents apparently considered the above language to be controlling as to the source of the payments under the contract at the time they filed the original petition, as they said in their suit (R. 10):

> "The contract further provides that within ten days after the expiration of each month from and after the aforesaid effective date, said defendant, the Regents of the University System of Georgia, shall determine the net billings for said month *and shall pay 15 per cent thereof* to the hereinafter named agent of the second parties *and said monthly payments of 15 per cent of the net billings of said station* shall exist and continue for a full period of 80¾ months and until January 6, 1950'." (Emphasis added)

The trial court apparently considered that the payments under the contract were to come from the operation of the radio station itself, its judgment reciting (R. 110):

> "7. The plaintiffs are entitled to have the defendant Board of Regents account to them *for fifteen per cent of the net billings received by the defendant Board of Regents from the operation of Radio Station WGST* from August 1, 1945 to September 1, 1947." (Emphasis added)

The Court of Appeals of Georgia apparently considered that the source of the payments under the contract was to be the operation of the radio station itself, its judgment reciting (R. 138);

> "What we hold, and nothing more, is that . . . the regents were liable to the plaintiffs under said contract for such breach *for the 15 per cent of the net billings received from the operation of said radio station* from August 1, 1945, to the filing of this suit . . ." (Emphasis added)

The record just does not bear out the current contention of the respondents that the contract simply "established a basis for determining the amounts to be paid" and that the "funds for the payments did not have to come from the operation of the station." On the contrary, the record clearly establishes that the opposite is true. As shown by respondents' own brief (p. 2-3), petitioner is a public corporation of the State of Georgia, authorized to acquire and hold property in trust for the respective institutions in the University System of Georgia; that the Georgia School of Technology (referred to as applicant) is a state-supported institution of higher learning and a constituent part of the University System of Georgia; and that petitioner accepted the transfer of the assets of the corporation known as Southern Broadcasting Stations, Inc. in *trust* for the exclusive use and benefit of Georgia Tech.

It is a matter of public knowledge that the State of Georgia appropriates public funds to the Board of Regents for the support and maintenance of the various units of the University System. We doubt the power, and certainly the propriety, of the Regents to pay approximately $150,000.00 of public funds, or any other funds under its control, other than the funds of the radio station, for the benefit of this trust. It is folly to suppose that when this contract was made any such proposition entered the minds of the parties on either side. The contract itself provided that petitioner should pay 15 per cent of the net billings of the station and it is inescapable that the parties intended the funds to come from this source and only from this source.

(b) The second contention of respondents is likewise without substantial merit. It is true that the Supreme Court of Georgia, in transferring this case to the Court of Appeals of Georgia, observed that petitioner had not prayed for any "affirmative equitable relief", but the Court was careful to provide (R. 126) that it was not intimating thereby any opinion as to the rights of petitioner and that a court at law was the proper tribunal to determine what rights petitioner might have under its plea, even though this might call for the application of equitable principles. The matter of equitable rescission (really restitution) was raised by the original answer (R. 23), petitioner contending that it had already paid to respondents more than the fair value of the property it had received from them; therefore under the equities of the situation petitioner contended it was not further indebted to respondents. The trial court ruled that petitioner could not go into that issue (R. 110), and petitioner duly excepted from this ruling (R. 4 and 120). The contention of respondents (Respondents brief, p. 17), that proper pleadings were not filed under Georgia practice to raise this issue, is therefore without foundation.

Lastly, respondents contend that since petitioner ac-

knowledges that there may be a *quasi* contractual liability on its part, the Court of Appeals of Georgia was authorized to find a breach of contract and award damages for such. This is an obvious *non-sequitur*, for the *quasi* contractual liability springs from the fact that the contract itself has become excusably impossible of performance on the part of petitioner and there is no actionable breach, but the equities of the situation demand that respondents should receive the fair value of what they have rendered.[1] But this is an entirely different thing from a judgment for 15 per cent of the net billings from the operation of the radio station, as called for by the condemned contract, without reference to the fair value of what petitioner received, or what respondents have already received in return therefor. In this connection respondents assert that the measure of damages under Georgia law for breach of a contract to pay for property sold and delivered is the agreed contract price. This rule, however, is subject to the limitation under Georgia law that a party cannot receive more by way of damages for a breach of contract than he would have received had there been no breach.[2] And it is perfectly obvious here that had petitioner stood on the contract when it was condemned by the Commission as violative of the Communications Act, there would have been no breach, *and there would have been no further operation of the radio station, either;* hence the contract would have been valueless to respondents.

[1] See American Law Institute, *Restatement of Contracts*, Sec. 468(2): "Rights of Restitution

> (2) Except where a contract clearly provides otherwise, a party thereto who has rendered performance, for which the other party is excused by impossibility from rendering the agreed exchange, can get judgment for the value of what he has rendered, less the value of what he has received, unless what he has rendered can be and is returned to him in *specie* within a reasonable time."

See also: Williston on Contracts, Sections 1972 and 1974.

[2] *Lastinger* v. *City of Adel*, 69 Ga. App. 535, 536, 26 S. E. (2) 158; 25 C.J.S. 566, par. 74; 15 Am. Juris. 442, par. 43.

Respondents contend that they have not collaterally attacked the rulings of the Commission and that no ruling was sought or had from the State court regarding any question over which the Commission had jurisdiction. In support of this they quote from the decision of the State court (R. 137) that "The plaintiffs are not collaterally attacking the order and decision of the Federal Communications Commission by petition in Fulton Superior Court." But what a litigant or even the lower court calls an action is not determinative of its purpose or effect, for the reviewing court will look through form to substance and judge accordingly.[3]

Can the statements that "No ruling was sought or had from the State court regarding any question over which the Commission had jurisdiction" (Respondents' brief, P. 8) and "The decision of the State court does not purport to, and does not, decide any question over which the Commission has jurisdiction" (Respondents' brief, p. 9) stand the test of the record? We think not.

It was stipulated in the record what is clearly the law, that under the Communications Act of 1934 the Commission had (and respondents knew they had) jurisdiction over any contract or agreement affecting the operation of a radio station in the public interest or affecting the present or future financial ability of a radio station to function in the public interest (R. 95). We take this to mean what it says.

The Commission, after hearing, determined that "the

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[3] *Venner* v. *Michigan Central Railroad Co.*, 271 U. S. 127; *Southern Railway Company* v. *State of Georgia*, 188 Ga. 569, 576, 4 S. E. (2) 233, where the Supreme Court of Georgia said:

> "By its prayer the State has sought exactly the same result it would have sought had it in terms prayed that the Commission's order be enjoined. Therefore, to say that the State has not, in effect, prayed that the certificate be enjoined would be to emphasize form and ignore substance and reality."

arrangements under the contract of April 15, 1943, would jeopardize the licensee's financial ability to conduct the future operation of the station in the public interest and that, therefore, public interest, convenience or necessity would not be served by a grant of the instant application" (R. 70). We take this to mean what it says.

The Court of Appeals of Georgia in its decision said:

> "It cannot be anticipated that the contract sued on, insofar as it related to the payment of the agreed purchase-price of this stock and of the assets of the corporation, giving to the regents complete control of the radio station and its operation, would so far affect the financial ability of the radio station as to render the station unable to operate in the public interest. The evidence fails to show that the contract would affect the public interest in reference to the broadcasts of this station" (R. 137).

We take this to mean what it says. There are other equally obvious examples of the invasion of the jurisdiction of the Commission by the decision of the State court. They are treated in our main brief and will not be repeated here.

3

Respondents contend that there was no duty or obligation upon them to intervene before the Commission upon the hearing on the second application for license renewal and the rhetorical question is asked as to what relief they could have sought had they intervened. No one has ever suggested that the hearing before the Commission was the proper forum in which the respondents should have sought a judgment for 15 per cent of the net billings from the operation of the radio station. But it *was* the proper forum in which to test the question as to the effect of the contract upon the public interest involved in the operation of the station. Respondents were vitally interested in the determination of that question and under the law and the rules

of the Commission, and in the light of the circumstances under which the issue arose, they not only had the clear right to intervene,[4] it was their duty to do so.[5] Failing to do so they are bound by the determination of the Commission, the same as petitioner, that the contract adversely affects the public interest in the operation of the station and is violative of the Communications Act. Their rights under the contract must thereafter be considered in the light of the Commission's decision. The present decision of the Court of Appeals of Georgia has determined those rights without regard to the Commission's decision. Therein lies the Court's error.

There is no merit in the suggestion that the respondents would be denied due process by being bound by the Commission's ruling. Respondents contend (Respondents' brief, p. 24) that they were not parties to any of the proceedings in which the rulings now relied upon were made. In making this assertion they ignore the fact that their corporation, Southern Broadcasting Stations, Inc., was a party by intervention to the proceedings on the first application for license renewal. Apparently their corporation, and its president (one of the present respondents), recognized the propriety and necessity of appearing in the earlier proceedings. It is obvious as a practical matter that the conditional denial of the first application was what made the contract of April 15, 1943 possible, and the decision of the Commission that petitioner could continue to operate the station if it assumed proper control, was the factor that enabled the parties thereto to think in terms of 15 per cent of the gross income from the further operation of the station. With complete knowledge of the factors which produced the contract; and

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[4] *Churchill Tabernacle* v. *Federal Communications Commission*, 160 F. 2d 244.

[5] *Red River Broadcasting Co., Inc.*, v. *Federal Communications Commission*, 98 F. 2d 282 (certiorari denied 305 U. S. 625).

with full knowledge of the result the parties sought to achieve by means of the contract; and with full knowledge that the hearing before the Commission was the forum in which it would be decided whether or not the desired result had been achieved; and with notice and knowledge of the hearing, the proposed decision and the final decision; and with the right to intervene as an interested party and the right to appeal as an aggrieved party guaranteed to them by law and the rules of the Commission, the respondents are hardly in a position to seriously contend that they have been denied due process.

Conclusion

We submit that the basic fallacy in the position of the respondents stems from a stubborn refusal to recognize the principle so often repeated by this Court that the rights of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the proper governmental authority, and that the rights of the parties to this litigation must be determined in the light of, and consistent with the decision of the Commission, and not by ignoring that decision.

Respectfully submitted,

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